

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Falcon First Communications, L.P.	)	
	)	File No. CSB-A-0313
Appeal of Local Rate Order	)	
of the City of Dalton, GA	)	
CUID GA 0051	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 27, 2005**

**Released: April 29, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Falcon First Communications, L.P. (“Falcon”), the franchised cable operator serving Dalton, Georgia, has appealed the May 7, 1996 Resolution of the City of Dalton (“City”).<sup>1</sup> The City’s local rate order revised basic service tier (“BST”) rates over two time periods, revised equipment and installation rates over two time periods, and ordered refunds and prospective rate adjustments.<sup>2</sup> The City opposed the appeal.<sup>3</sup> Falcon replied.<sup>4</sup> Falcon also filed a Supplement to Petitions for Review,<sup>5</sup> which the City opposed.<sup>6</sup> After considering the record, we are granting the appeal in part, denying it in part, and remanding some matters to the City for further action consistent with this order.

<sup>1</sup> Falcon, Petition for Review of Rate Order, filed June 6, 1996 (“Falcon Petition” or “Petition”).

<sup>2</sup> City of Dalton, Georgia, Resolution Adopting a Rate Order Regarding Cable Television Basic Service Rates and Associated Charges of Falcon First, Inc. (“City Resolution” or “Resolution”), found at Falcon Petition, Ex. A.

<sup>3</sup> Opposition of the City of Dalton, Georgia to Petition for Review of Rate Order of Falcon First Communications, L.P., filed June 20, 1996 (“City Opposition” or “Opposition”).

<sup>4</sup> Falcon, Reply to Opposition to Petition for Review of Rate Order, filed June 26, 1996 (“Falcon Reply” or “Reply”).

<sup>5</sup> Falcon, Supplement to Petitions for Review, filed Jan. 17, 1997 (“Falcon Supplement” or “Supplement”).

<sup>6</sup> City, Opposition to Supplement to Petitions for Review, filed Feb. 18, 1997 (“City Opposition to Supplement” or “Opposition to Supplement”).

## II. BACKGROUND

2. Rate orders issued by a franchising authority may be appealed to the Commission.<sup>7</sup> In ruling on appeals, the Commission will not conduct a de novo review, but instead will sustain the franchising authority's decision if it has a reasonable basis.<sup>8</sup> The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules.<sup>9</sup> If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.<sup>10</sup>

3. Cable operators using the Commission's benchmark methodology computed initial regulated BST rates using FCC Form 1200.<sup>11</sup> Cable operators periodically adjust their BST rates for changes in inflation, external costs, or the number of channels. Cable operators initially used FCC Form 1210 for computing adjustments pursuant to the Commission's quarterly rate adjustment methodology.<sup>12</sup> The Commission subsequently adopted an annual rate adjustment methodology computed on FCC Form 1240.<sup>13</sup> Cable operators have the option of using either rate form. Cable operators annually compute cost-based equipment and installation rates using FCC Form 1205.<sup>14</sup>

4. When establishing initial regulated rates, cable operators computed their total regulated revenue per subscriber from programming tiers and equipment installations and leases, adjusted this based on benchmarks or the full differential between competitive and non-competitive cable systems, removed per subscriber equipment and installation costs computed on the FCC Form 1205 Worksheet for Calculating Total Equipment and Installation Costs, and allocated the remaining regulated revenue among then-regulated programming tiers to establish programming tier rates.<sup>15</sup> This methodology established a reciprocal relationship between programming tier revenues and equipment costs that was severed once the cable operator unbundled equipment costs from regulated revenues.

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<sup>7</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944(b).

<sup>8</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5731 ¶ 149 (1993) (“*Rate Order*”); 9 FCC Rcd 4316, 4346 ¶ 81 (1994) (“*Third Reconsideration*”).

<sup>9</sup> *Rate Order*, 9 FCC Rcd at 5731.

<sup>10</sup> *Id.* at 5732.

<sup>11</sup> See FCC Form 1200, Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994 (May 1994). FCC Form 1200 replaced FCC Form 393 previously used for establishing initial regulated programming and equipment rates.

<sup>12</sup> See FCC Form 1210, Updating Maximum Permitted Rates for Regulated Cable Services (May 1995).

<sup>13</sup> See FCC Form 1240, Updating Maximum Permitted Rates for Regulated Cable Services (July 1996).

<sup>14</sup> See FCC Form 1205, Determining Regulated Equipment and Installation Costs (May 1994, revised June 1996).

<sup>15</sup> See FCC Form 1200; FCC Form 1205, Worksheet for Calculating Total Equipment and Installation Costs (May 1994 and June 1996), and accompanying FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equipment and Installation at 21-22 (May 1994), or 21-23 (June 1996). This worksheet is used only for unbundling.

### III. DISCUSSION

5. In its Resolution, the City revised Falcon's BST rates computed on FCC Form 1200 for the period from May 15, 1994 through July 6, 1995 and BST rates computed on FCC Form 1210 for the period from July 7, 1995 until the issuance of the Resolution.<sup>16</sup> The City also revised Falcon's equipment and installation rates submitted on FCC Form 1205 for the same periods, May 15, 1994 through July 6, 1995 ("First Form 1205") and July 7, 1995 until the issuance of the Resolution ("Second Form 1205").<sup>17</sup> The City ordered refunds for the period running from 305 days prior to the effective date of its order through the date Falcon implemented the required rate reductions.<sup>18</sup> In making its findings, revising rates, and ordering refunds, the City relied on a report from its consultant.<sup>19</sup>

#### A. Equipment Basket and Hourly Service Charge

6. After reviewing Falcon's justification for its initial regulated BST rate and its hourly service charge ("HSC"), the City's consultant advised that Falcon had not unbundled contract labor expenses when computing its BST rate on FCC Form 1200, although Falcon did include contract labor expenses in its Second Form 1205 equipment basket costs.<sup>20</sup> The consultant also advised that Falcon's equipment basket did not include the hours and dollars for repairing or maintaining home wiring, although Falcon imposed either a per-visit charge or a monthly wire maintenance charge for this activity.<sup>21</sup> The consultant recommended adjusting Falcon's monthly equipment cost per subscriber, the figure used for unbundling equipment basket costs from regulated BST revenue, to include these costs.<sup>22</sup> He recommended doing this by computing a wire maintenance adjustment from Falcon's monthly wire maintenance charge, not any particular costs.<sup>23</sup> He then recommended adding this estimate of wire maintenance costs and an amount for Falcon's contract labor expenses to the other customer equipment and installation costs in the computation and making a corresponding adjustment to Falcon's initial unbundled BST rate.<sup>24</sup> The consultant also recommended adjusting Falcon's HSC used in setting equipment basket rates to reflect his estimate of the hours and dollars attributable to home wiring repair and maintenance.<sup>25</sup> Based on the consultant's analysis and recommendations, the City found that "the Company excluded contract labor and home wiring maintenance expense from its calculation of its Monthly Equipment Cost per Subscriber and its Hourly Service Charge."<sup>26</sup> These adjustments by the City lowered the BST rate computed on FCC Form 1200 and increased the HSC.

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<sup>16</sup> City Resolution at 2 Ordering Clause 1.

<sup>17</sup> *Id.* Ordering Clauses 2, 3.

<sup>18</sup> *Id.* Ordering Clause 4.

<sup>19</sup> For the consultant's report, see Rate Report, attached to Letter from James C. Sanders, Jr., City Administrator, to Emerson G. Yearwood, Director of Gov't Relations, Falcon (Jan. 17, 1996), found at Falcon Petition, Ex. A.

<sup>20</sup> Rate Report at 3.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 3, 4.

<sup>23</sup> *Id.* at 4 & App. A.

<sup>24</sup> *Id.* at 4-5 & App. A.

<sup>25</sup> *Id.* at 5 & App. B.

<sup>26</sup> City Resolution at 1.

7. Falcon challenges the City's decision to increase the equipment basket costs used in the unbundling computation by adding in amounts representing additional contract labor and home wiring maintenance expenses.<sup>27</sup> Falcon also challenges the figure used by the City for contract labor and the City's methodology for calculating the additional home wiring maintenance cost.<sup>28</sup> Falcon also challenges the City's adjustment to its HSC.<sup>29</sup>

8. *Contract labor expenses.* According to Falcon, it uses contract labor to perform installations and chose to capitalize the labor associated with customer installations as part of the capitalized cost of a drop rather than treat the contract labor expense as an equipment basket item.<sup>30</sup> It faults the City for moving contract labor expenses to the equipment basket, arguing it believed the instructions to FCC Form 1205, at page 25, permitted it to capitalize these expenses.<sup>31</sup> In response to the City's concern that including contract labor expenses in the equipment basket in the next FCC Form 1205 led to a double recovery of the expenses,<sup>32</sup> Falcon claims only that the Commission's rules do not preclude an operator from changing aspects of its rate calculation and doing so did not result in a double recovery during the first time period because BST overcharges and HSC undercharges were offsetting.<sup>33</sup>

9. We find no merit to Falcon's arguments. The FCC Form 1205 instructions at page 25 simply direct the operator to indicate whether it has capitalized the labor costs associated with subscriber cable drops and refer the operator to Step A of the Worksheet for Calculating Permitted Equipment and Installation Charges.<sup>34</sup> As the City points out,<sup>35</sup> the relevant FCC Form 1205 instructions allow only the labor costs associated with installing subscriber drops to be capitalized. This choice "does not include labor costs associated with equipment or inside wiring located on customer premises."<sup>36</sup> Furthermore, Falcon's treatment of the contract labor expenses left them embedded in the BST rate. By adding those costs to the equipment basket in its next rate filing without unbundling them,<sup>37</sup> Falcon would be recovering the same costs twice, through both the BST rate and the equipment basket.<sup>38</sup> Falcon's argument that, initially, BST overcharges and equipment basket undercharges were offsetting for refund

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<sup>27</sup> Falcon Petition at 3-4.

<sup>28</sup> *Id.* at nn.2, 3.

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 3.

<sup>31</sup> *Id.*; Falcon Reply at 2.

<sup>32</sup> City Opposition at 8.

<sup>33</sup> Falcon Reply at 3.

<sup>34</sup> FCC Form 1205, Instructions for Determining Costs of Regulated Cable Equipment and Installation, page 25 (May 1994) ("FCC Form 1205 Instructions"). This version of the instructions was in use when Falcon filed.

<sup>35</sup> City Opposition at 7.

<sup>36</sup> FCC Form 1205 Instructions at 14. (May 1994). This instruction is repeated in FCC Form 1205 Instructions at 15 (June 1996).

<sup>37</sup> *See* City Opposition at 8-11.

<sup>38</sup> *Falcon Community Ventures I*, DA 05-193 ¶ 10 2005 WL 195509 (F.C.C.) (released Jan. 28, 2005). "Unbundling equipment costs from the regulated revenues used to set programming rates reduced the BST rate, because those costs were no longer recovered through the BST rate. Costs that were not unbundled were built into the operator's base rate and continue to be recovered through the base rate until unbundled." *Id.* n.31 (citations omitted).

purposes does not address this problem.<sup>39</sup> The City was not unreasonable in concluding that Falcon should have included the contract labor expenses associated with customer installations in its equipment basket from the outset and unbundled them in computing its initial permitted BST rate on FCC Form 1200.<sup>40</sup>

10. Even if the City's treatment of its contract labor expenses is upheld, Falcon seeks a remand to correct what it argues is an overstated figure for contract labor expense.<sup>41</sup> The consultant used the regional contract labor figure of \$281,322 reported in Falcon's second FCC Form 1205, a figure based on 1994 data. Falcon claims that its records for 1992, the year reflected in its first Form 1205, show the figure was \$84,509 and asks that the City be directed to use this figure.<sup>42</sup> The City argues that the absence of information from Falcon during the rate review forced it to estimate contract labor expenses, and it assumed that the expenses for 1992 and 1994 were approximately the same.<sup>43</sup> When a cable operator bearing the burden of proving the reasonableness of its proposed rates fails to provide relevant information, the franchising authority may base its decision on "the best information available at the time."<sup>44</sup> In a similar case, we concluded that the franchising authority could reasonably use the cable operator's data from a different time period as a starting point but should make a reasonable effort to adjust that data from other available information to better approximate what would have been the contract labor expense for the time period under review.<sup>45</sup> Absent anything in the record showing that the City tried to do this, we conclude that the City's adjustment for contract labor is not reasonable and must be remanded. So that the City's review on remand can be as informed as possible, Falcon is instructed to provide the City with the contract labor expense missing from its first FCC Form 1205 within a reasonable time set by the City for filing the information.

11. *Optional Wire Maintenance Agreement.* Falcon argues that the City erred when adding wire maintenance agreement costs to the equipment basket because Falcon had already unbundled these costs and included them in the equipment basket. According to Falcon, its wire maintenance agreement charge is unregulated,<sup>46</sup> but it nevertheless did not separate out expenses for installing and maintaining

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<sup>39</sup> See Falcon Reply at 3.

<sup>40</sup> *Falcon Community Ventures I*, DA 05-193 ¶ 10; *Falcon First Communications, L.P.* (Whitfield County, GA), 14 FCC Rcd 7277, 7281 ¶ 10 (Cab. Serv. Bur. 1999), *review denied*, 15 FCC Rcd 17059 (2000).

<sup>41</sup> Falcon Petition at 3 n.2; Falcon Reply at 2-3; Rate Report, App. A.

<sup>42</sup> Falcon Petition at 3 n.2; Falcon Reply at 2-3.

<sup>43</sup> See City Opposition at 11.

<sup>44</sup> See *Third Reconsideration*, 9 FCC Rcd at 4347 ¶ 84.

<sup>45</sup> See *Falcon First Communications*, 14 FCC Rcd at 7282 ¶ 12 (citing *Sammons Communications of Connecticut, Inc.*, 10 FCC Rcd 5583, 5585 ¶ 11 (Cab. Serv. Bur. 1995) (revision of operator rate form by using a mixture of updated and original data was not reasonable)).

<sup>46</sup> Falcon Petition at 7-8. The Commission has previously held that wire maintenance agreements for customer-owned wiring are subject to rate regulation. *TCI of Southeast Mississippi*, 13 FCC Rcd 11080, 11084-87 (Cab. Serv. Bur. 1998). "Comparing the relative costs and benefits of purchasing an inside wiring maintenance plan versus relying on the [cable operator's] HSC is a difficult, if not amorphous, task . . . require[ing] a subscriber to make assumptions about future events that even the cable operator may be unable to predict reliably for a particular subscriber. . . . It cannot be said that a regulated, HSC-based charge parallels the unregulated inside wiring maintenance plan." *Id.* at 11086 ¶ 17. Absent a showing that a cable operator's maintenance plan is or is intended to be cost-based as required by 47 U.S.C. § 543(b)(3) or how competitive pressures from its HSC or third parties will insure that an inside wiring maintenance plan will be offered in compliance with the statutory standard,

(continued...)

equipment based on how it charges subscribers.<sup>47</sup> The City disagrees based on statements to the contrary Falcon made during the rate review.<sup>48</sup> These include Falcon's response to the consultant's query "whether the labor hours spent performing home wire maintenance are included in Line 6" that "[s]ervice work is performed by technicians whose costs and hours are excluded from the installation charge calculation,"<sup>49</sup> and Falcon's comments on the City's draft rate order and consultant's report that "it was justified in not including the maintenance costs for home wiring in the equipment basket on Forms 1200 and 1205."<sup>50</sup> In reply, Falcon explains that it "did omit labor hours from its Form 1205 calculation, but the plain fact is that it included all installations and maintenance labor expense."<sup>51</sup> Falcon offers no support for this statement and makes no claim that it provided clarifying information below. Based on the record before us, the City was not unreasonable in determining that costs associated with Falcon's wire maintenance agreements were not in the equipment basket and should be added to it.<sup>52</sup>

12. We agree with Falcon, however, that the City's recalculation of the monthly equipment cost per subscriber, the amount used to unbundle equipment costs from regulated revenues, is not reasonable and must be remanded. The City rejected Falcon's wire maintenance charge as too high and ordered a lower charge closer to the state-wide average,<sup>53</sup> but it inconsistently used the rejected wire maintenance charge as a basis for calculating a value for home wire maintenance costs.<sup>54</sup> Using a rejected rate to estimate Falcon's wire maintenance plan costs was not reasonable.<sup>55</sup> Because the City must determine the appropriate wire maintenance expenses on remand, the City should also determine whether Falcon

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showings not made here, the Commission has rejected arguments that an operator's rate for a wire maintenance plan should not be regulated. *TCI of Southeast Mississippi* at 11086 ¶ 18; *Falcon First Communications*, 14 FCC Rcd at 7289 ¶ 31. In contrast, the Commission has recognized that a "whole-house" maintenance plan provided by local exchange carrier will exert competitive pressure on a "whole-house" maintenance plan offered by a cable operator and is not subject to rate regulation where the cable operator also offers an HSC-based, regulated wire maintenance option to safeguard consumers. *Request for Clarification of Rate Regulatory Rules, Inside Wire Maintenance*, 16 FCC Rcd 2198 (Cab. Serv. Bur. 2001).

<sup>47</sup> Falcon Petition at 3-4.

<sup>48</sup> City Opposition at 12.

<sup>49</sup> *Id.* Ex. D, Request for Supplemental Rate Information, Question 12; Ex. E, Letter from Falcon to Don Schanding, Georgia Municipal Ass'n (July 5, 1995), Reply to Question 12.

<sup>50</sup> *Id.* Ex. C, Letter from Emerson Yearwood, Director of Cable Regulatory Affairs, Falcon, to James C. Sanders, Jr., City Administrator (Feb. 9, 1996) at 2.

<sup>51</sup> Falcon Reply at 4 (underlining in original).

<sup>52</sup> In its Supplement filed after the close of the comment period, Falcon argues it would have no refund liability even if it did not unbundle all home wire maintenance costs because the revenue it collected generally did not exceed its unbundled costs. Falcon Supplement at 3. Whether Falcon does or does not owe refunds has no effect on the reasonableness of the City's decision to require rate computations consistent with Commission rules and rate forms by correctly unbundling equipment costs from the initial regulated BST rate. As explained *supra* note 38, costs not unbundled are built into the BST rate.

<sup>53</sup> City Resolution at 1, 2, Ordering Clauses 2, 3; Rate Report at 7.

<sup>54</sup> Rate Report, App. A.

<sup>55</sup> *Falcon First Communications*, 14 FCC Rcd at 7284 ¶ 17.

unbundled these wire maintenance costs from its programming revenues.<sup>56</sup> If the costs were unbundled, they should not be unbundled a second time.<sup>57</sup> So that the City's review of Falcon's wire maintenance costs on remand can be as informed as possible, Falcon is instructed to provide the City with detailed information justifying its treatment of wire maintenance costs within a reasonable time set by the City for filing the information.

13. Falcon also argues that the City erroneously computed the adjustment for wire maintenance by using the number of cable subscribers in the "region" rather than the number for the City, which Falcon entered on line 11 of the Form 1205 Worksheet for Calculating Total Equipment and Installation Costs.<sup>58</sup> The City explains that its consultant used the regional subscriber number when adjusting Line 7 of the unbundling worksheet because Falcon performed its calculations for Line 7 at the regional level.<sup>59</sup> Then, like Falcon, the consultant allocated expenses to the franchise level on Lines 8 and 9 and determined the per subscriber equipment basket cost for the franchise area using the number of subscribers in the franchise area shown on Line 11 of Falcon's form.<sup>60</sup> This removed the expense for subscribers who are not within the City. Falcon's argument that the City's consultant erroneously used the wrong number of subscribers is without merit, and the appeal on this issue is denied.<sup>61</sup>

14. *Hourly Service Charge.* Falcon argues that the City made the same errors in recalculating Falcon's HSC that it made in recalculating Falcon's unbundled equipment basket costs because the City's consultant added the same contract labor expenses and home wiring maintenance costs discussed above to Falcon's HSC computation.<sup>62</sup> To the extent that the City corrected for contract labor expenses in 1992 based on Falcon's unadjusted expenses for 1994 and corrected for home wiring maintenance based on Falcon's disallowed Wire Maintenance Agreement Charge, we agree and are remanding this issue for further consideration. Our concerns with these corrections are the same concerns we have with the City's adjustment to the equipment basket discussed *supra* in paragraphs 10 and 12. Once Falcon provides more responsive information about its contract labor expenses and wire maintenance costs, the City should take that information into consideration on remand.

## **B. Minimum Installation Charges**

15. The City found that Falcon charged subscribers a minimum of one-half hour of labor for installations, despite the fact that some installation types typically require substantially less than half an

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<sup>56</sup> *Falcon First Communications*, 15 FCC Rcd at 17060 ¶ 4; *see also Falcon Community Ventures I*, DA 05-193 ¶ 13; *ML Media Partners, L.P.* (Fairfield, CA), 11 FCC Rcd 1017, 1026 ¶ 20 (Cab. Serv. Bur. 1995) (a contract for the maintenance and repair of customer-owned home wiring must be based on the operator's HSC multiplied by either the estimated average number or actual number of hours for maintenance and repair of the home wiring equipment).

<sup>57</sup> Unbundling the same costs twice would raise equipment and installation costs above actual costs, the statutory standard for equipment and installation rates in 47 U.S.C. § 543(b)(3), and would unfairly suppress programming tier rates computed on FCC form 1200.

<sup>58</sup> Falcon Petition at 4 n.3.

<sup>59</sup> City Opposition at 14; Rate Report, App. A.

<sup>60</sup> City Opposition at 14-15.

<sup>61</sup> *Falcon Community Ventures I*, DA 05-193 ¶ 14; *Falcon First Communications*, 14 FCC Rcd at 7284 ¶ 18.

<sup>62</sup> Falcon Petition at 5.

hour to resolve.<sup>63</sup> Based on the consultant's recommendation that the appropriate charge should be based on Falcon's actual HSC, the City ordered refunds of estimated overcharges of \$13,356 and ordered Falcon not to set a minimum charge for service calls and not to include travel time in the charges.<sup>64</sup> According to the City's consultant, Falcon excluded travel time to a customer's home in calculating its HSC but was effectively recovering travel time from some customers by charging a minimum rate for service calls.<sup>65</sup>

16. Falcon objects to the City's treatment of its minimum service charge, arguing that a cable operator is entitled to use an average for setting installation rates and that its installation charges averaged out when it charged one-half hour for subscribers whose service calls took a few minutes longer than that.<sup>66</sup> According to the City, however, Falcon is not entitled to average installation charges for several reasons. When setting initial rates, Falcon elected to use per-hour charges instead of several average charges for different types of installations; it elected to compute the HSC without including travel time, which results in a higher HSC, but then effectively recovers some travel time through its minimum charge; and based on Falcon's own calculations, most installations require less than 30 minutes and those are never rounded down.<sup>67</sup>

17. To support the reasonableness of its minimum-charge policy, Falcon claims it collected \$88,000 less in HSC-based charges in the Dalton region than it could have legally received.<sup>68</sup> The City objects to rationalizing the minimum charge based on an alleged and undocumented shortfall possibly due to factors other than rounding, such as promotional discounts or decisions not to charge a particular customer for a service.<sup>69</sup> Falcon replies that it charged on the basis of an HSC substantially less than the permitted HSC computed by the City's consultant, making any refund liability for past minimum charges minimal and difficult to determine.<sup>70</sup>

18. Neither the Commission's rules nor FCC Form 1205 specify any particular method for counting labor hours. What is required, however, is that an operator use the same method for counting labor hours both when calculating the HSC and when calculating the specific charges for its various installations and equipment. This makes an operator's choice about handling indirect and direct costs revenue neutral. An operator may elect to bill for installations on the basis of the HSC or a standard charge.<sup>71</sup> Having elected to bill based on the HSC, Falcon cannot bill some customers more than the HSC for installation and maintenance and rationalize it as an "average." The City was not unreasonable in

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<sup>63</sup> City Resolution at 1.

<sup>64</sup> *Id.* at 3, Ordering Clauses 5, 8; Rate Report at 6 and App. C.

<sup>65</sup> Rate Report at 6.

<sup>66</sup> Falcon Petition at 6.

<sup>67</sup> City Opposition at 17-19.

<sup>68</sup> Falcon Petition at 6-7.

<sup>69</sup> City Opposition at 19-20.

<sup>70</sup> Falcon Reply at 7.

<sup>71</sup> FCC Form 1205 Instructions at 15 (May 1994); FCC Form 1205 Instructions at 16 (June 1996).

finding that Falcon's practice could result in overcharges and in ordering Falcon to discontinue the practice.<sup>72</sup> Falcon's appeal on this issue is denied.

19. However, because refund liability for equipment and installation charges is based on the difference between a cable operator's actual rate and its permitted rate,<sup>73</sup> refunds should have been determined based on Falcon's permitted rate, the rate it could have charged, rather than the actual HSC rate. An operator must refund the difference when revenue from its actual service charge exceeds the revenue computed from its permitted rate during the review period.<sup>74</sup> Requiring a cable operator to make refunds when it has received less than the permitted revenue is comparable to ordering the cable operator to charge less than the permitted rate, which a franchising authority may not do.<sup>75</sup> Because the City determined refund liability based on Falcon's actual HSC for those installations, rather than its higher permitted HSC, the City's refund order is not reasonable and is remanded.

### C. Programming Cost Increases

20. The City found that Falcon had not provided sufficient information to support its claim of programming cost increases on FCC Form 1210 and disallowed those increases.<sup>76</sup> Falcon argues it supplied adequate substantiation by providing a list of its programming services and their monthly per subscriber cost increases during the relevant time period.<sup>77</sup> To protect proprietary information it did not provide the requested copies of its contracts with program suppliers. The City, on the other hand, was unwilling to permit Falcon to pass through unverified programming cost increases of the magnitude Falcon claimed.<sup>78</sup> After this proceeding began, the City agreed to hold proprietary contractual information confidential, and Falcon gave the information to the City's consultant.<sup>79</sup> Falcon requests a remand of this portion of the rate order so that the City can take this information into consideration.

21. We will grant Falcon's request. The Commission has previously acknowledged a franchising authority's right to request information supporting a rate increase, including proprietary information "reasonably necessary to make a rate determination," but noted that confidential programming contracts may contain a substantial amount of sensitive business information beyond what is reasonably necessary for a franchising authority's rate determination.<sup>80</sup> The Commission has urged franchising authorities and

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<sup>72</sup> *Falcon Community Ventures I*, DA 05-193 ¶ 18; *Falcon First Communications*, 14 FCC Rcd at 7287.

<sup>73</sup> See 47 C.F.R. § 76.942; *A-R Cable Services-ME, Inc. v. Town of Lisbon*, 10 FCC Rcd 1783, ¶ 7 (Cab. Serv. Bur. 1995).

<sup>74</sup> This computation should be done based on published rates for the period under review, without regard to promotional discounts. The costs of any promotions should not be recovered by reducing an operator's refund liability. See *Rate Order*, 8 FCC Rcd at 5820 ¶ 302 (cable operators cannot include costs of promotions as part of equipment charges); *United Cable Television of California, Inc.*, 11 FCC Rcd 4465, 4469 (Cab. Serv. Bur. 1995); *Telenois, Inc.*, 10 FCC Rcd 9530, 9532 n.13 (Cab. Serv. Bur. 1995).

<sup>75</sup> See *TCI of Southeast Mississippi*, 10 FCC Rcd 8728, 8730 ¶¶ 13, 15 (Cab. Serv. Bur. 1995).

<sup>76</sup> City Resolution at 1; Rate Report at 5.

<sup>77</sup> Falcon Petition at 4-5; Falcon Reply at 5-6.

<sup>78</sup> City Opposition at 15-16.

<sup>79</sup> Falcon Reply at 6.

<sup>80</sup> *Falcon First Communications*, 14 FCC Rcd at 7290 ¶ 34, quoting *Third Reconsideration*, 9 FCC Rcd at 4344 ¶ 77.

cable operators to adopt procedures “that will achieve the proper balance between the franchising authority’s right to review relevant information and the cable operator’s interest in maintaining the confidentiality of sensitive business information.”<sup>81</sup> Now that the City and Falcon have apparently found this balance, a remand for the City’s review of this documentation is appropriate.

#### D. “Gap” Period

22. Finally, Falcon seeks a remand of the City’s rate order so that it can be adjusted for recovery of external costs Falcon incurred between the passage of the 1992 Cable Act and the initial date of regulation, the “gap” period.<sup>82</sup> When Falcon filed its FCC Form 1200, cable operators using the benchmark methodology to set rates were permitted to adjust rates on account of external costs starting with the initial date of regulation for the system or February 28, 1994, whichever was earlier.<sup>83</sup> The benchmark system was based on a survey that demonstrated the difference between rates in competitive and noncompetitive situations on September 20, 1992. Under the benchmark system, most regulated cable operators were required to reduce their regulated rates to a level that represented their September 30, 1992 regulated revenues reduced by a 17% competitive differential. The Commission’s initial rate regulations did not allow cable operators to account for changes in external costs between September 20, 1992 and the date of initial regulation, the “gap” period. Before the City adopted its rate order, the court in *Time Warner Entertainment I* found that the Commission’s rationale for not permitting rate justifications based on external costs during this gap period was unacceptable and vacated the Commission’s rule insofar as it denied cable operators recovery of gap period external cost increases.<sup>84</sup> Subsequent to the rate order, the Commission adopted an order amending its rate rule to provide that an operator whose initial rates were set on the basis of rates in effect on September 30, 1992 could adjust its rates for changes in external costs incurred between September 30, 1992 and either the initial date of regulation of February 28, 1994, whichever date applied in the individual operator’s circumstances.<sup>85</sup> The Commission explained that an operator’s then current permissible rate could be adjusted in the operator’s next rate adjustment after the Commission’s *Gap Order* to reflect the rates the operator would be charging at the time of the adjustment if it had been permitted to include increases in external costs occurring during the gap period.<sup>86</sup> The adjustment was to be calculated from information in a previously filed FCC Form 1200. To the extent the Commission did not provide for the recovery of the revenue deficiencies experienced by operators during the years before the gap period costs could be reflected in rates, the court in *Time Warner Entertainment II* vacated the Commission’s *Gap Order*.

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<sup>81</sup> Letter to Wesley R. Heppler, Esq., 10 FCC Rcd 9433, 9434-35 (Cab. Serv. Bur. 1995).

<sup>82</sup> Falcon Petition at 9-10; Falcon Reply at 9.

<sup>83</sup> See 47 C.F.R. § 76.922(d)(3)(vii)(1994). The initial date of regulation was the date after September 1, 1993 effective date of the Commission’s rate regulations that an individual operator first became subject to rate regulation for either the basic or the cable programming service.

<sup>84</sup> 56 F.3d. 151, 174, 178 (D.C. Cir. 1995).

<sup>85</sup> 47 C.F.R. § 76.922(f)(4); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 11 FCC Rcd 20206 (1996) (“*Gap Order*”), vacated in part *Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75 (D.C. Cir. 1998) (“*Time Warner Entertainment II*”) (vacated to the extent that the Commission’s order did not allow full reduction rate operators to recover their revenue deficiencies for the years during which they were denied recovery for gap costs).

<sup>86</sup> *Gap Order*, 11 FCC Rcd at 20216.

23. The City argues that its failure to take into account rules that had not yet been adopted cannot be a basis for granting Falcon's appeal. Because the rate issues before us are being remanded for further review, we are granting the relief requested by Falcon. The rule the City applied was found to be invalid by the court, and Falcon timely questioned the impact of its gap period costs on its potential refund liability when it appealed the City's rate order. On remand, Falcon should be permitted to make a showing of its gap period costs.<sup>87</sup>

#### IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Petition for Review of Rate Order filed by Falcon First Communications, L.P. on June 6, 1996 (File No. CSB-A-0313) IS GRANTED IN PART AND DENIED PART and that the Resolution passed by the City of Dalton, Georgia on May 7, 1996 IS REMANDED IN PART to the City of Dalton, Georgia for further action consistent with this Memorandum Opinion and Order.

25. IT IS FURTHER ORDERED that, within a reasonable time set by the City of Dalton, Georgia, Falcon First Communications, L.P. MUST SUBMIT to the City of Dalton, Georgia its 1992 contract labor expenses and detailed information justifying its treatment of expenses associated with its inside wiring maintenance plan as directed herein.

26. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief, Policy Division, Media Bureau

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<sup>87</sup> *Falcon First Communications*, 14 FCC Rcd at 7296-97 ¶ 49.